Filed 3/1/10 In re Andrew C. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ANDREW C., a Person Coming Under the Juvenile Court Law.	B216665 (Los Angeles County Super. Ct. No. CK69826)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CHRISTINA M. et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Margaret S. Henry, Judge. Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant, Christina M.

Lori Siegel, under appointment by the Court of Appeal, for Defendant and Appellant, Gerardo C.

Raymond Fortner, County Counsel, James M. Owens, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Gerardo C. (father) and Christina M. (mother) appeal from an order terminating parental rights over their son Andrew. Finding no error, we affirm the juvenile court's order.

FACTUAL AND PROCEDURAL SUMMARY

After seven referrals over more than two years where domestic violence was alleged, in September 2007, the Los Angeles County Department of Children and Family Services (DCFS) filed a petition pursuant to Welfare and Institutions Code section 300[1] to have 13-month old Andrew detained from his parents and declared a dependent child. The petition also sought to have siblings Alyssa and Steven detained.[2] The petition, as amended and sustained, alleged domestic violence between mother and father, inappropriate physical discipline of Alyssa, and a history of substance abuse by mother and father. Andrew was detained from both of his parents and placed with a nonrelated extended family member.

At a detention hearing later that month, the juvenile court ordered family reunification services, and ordered DCFS to investigate placement of Andrew with paternal aunt Evelyn C. Following the hearing, DCFS determined that placement of Andrew with Evelyn C. would be in his best interest. Father supported Andrew's placement with Evelyn C., writing in a letter to DCFS that Andrew previously had stayed with her on many occasions, and she had purchased everything necessary for him to be comfortable in her home. Andrew was placed with Evelyn C., and monitored visitation was ordered for mother and father. The court ordered random drug testing, domestic violence counseling, and parent education for both mother and father. The court also

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[1] All unspecified statutory references are to the Welfare and Institutions Code.

[2] The court ultimately terminated jurisdiction over Steven and Alyssa with orders granting physical custody to their respective fathers. Andrew is a maternal half-sibling to Steven and Alyssa.

ordered mutual restraining orders against them that were to remain in effect for three years.

In December 2007, DCFS reported to the court that mother and father were participating in parenting and domestic violence courses. Father tested negative on four drug tests, and mother provided one negative drug test but did not appear for another. The trial court ordered continued drug testing, and lifted the restraining orders issued in September. In March 2008, DCFS reported to the court that mother and father had continued their relationship, that mother tested positive for methamphetamines in January 2008, and that she had not appeared for eight tests and tested negative once. She had been arrested and incarcerated for assault and possession of drug paraphernalia in January 2008. Evelyn C. reported that Andrew was in good health and was enrolled in preschool; the court ordered that Andrew continue to be placed with her.

Over the following months, mother continued to miss drug tests. She and father maintained their relationship, and both visited with Andrew. At a hearing in April 2008, mother and father had an altercation at the courthouse. In June 2008, the court denied a section 388 petition filed by father requesting that Andrew be returned to his care or that unmonitored visits be ordered.

In December 2008, the court held a 12-month review hearing. Mother continued to miss drug tests, and she and father's relationship remained contentious. Father worked primarily outside of California, although he recently had leased a residence in the Los Angeles area. Several family members, friends, and neighbors submitted letters to DCFS expressing concern or support about Andrew's potential placement with mother or father. The paternal grandmother wrote a letter questioning mother and father's fitness as parents and stating that that she believed Evelyn C. provided the best environment for Andrew. DCFS recommended that the court terminate reunification services for both parents, and the matter was set for hearing.

In January 2009, DCFS reported that mother had missed drug tests and tested positive for methamphetamine and amphetamine earlier that month. Father had

completed parenting and domestic violence counseling. Both parents missed scheduled visits with Andrew, but were loving and appropriate during their visits. At the hearing father testified that he had seen mother recently, and did not believe that Andrew would be negatively impacted by their relationship. The court terminated reunification services for both parents and set a section 366.26 hearing to identify a permanent plan for Andrew.

At the section 366.26 hearing in May 2009, the court denied a request by mother and father for a bonding study pursuant to Evidence Code section 730 (Section 730). The court terminated parental rights and freed Andrew for adoption, finding that Andrew's "mother has been Evelyn [C.] for the last 18 months," and he needed the stability she provided.

DISCUSSION

I

Mother and father claim the court abused its discretion in denying their requests for a bonding study pursuant to Section 730. Section 730 authorizes the juvenile court to appoint an expert witness to examine the bond between a parent and child. (*In re Jennifer J.* (1992) 8 Cal.App.4th 1080, 1084.) We review the court's decision for abuse of discretion. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1339.)

At the section 366.26 hearing in May 2009, mother and father requested to "have an expert evaluate the degree and quality of the bond between the child and parent and whether it would be detrimental to [permanently] sever . . . the parent-child relationship . . . ." The court found that a Section 730 evaluation would not assist it in deciding the case in light of the availability of other witnesses who had observed mother's and father's interactions with Andrew over time.

When, as here, "it is unlikely that a bonding study would have been useful to the juvenile court," there is no error if the court does not appoint an expert. (*In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1341.) The court in this case permitted the testimony of

several people who had observed and monitored the parents' visitation with Andrew. Mother and father testified about their bond with Andrew, and father introduced a videotape showing interactions between him and Andrew. There was sufficient evidence on the record upon which to evaluate the bond between Andrew and his parents.

Moreover, the request for a bonding study came very late in the proceedings, several months after reunification services were terminated. "Bonding studies after the termination of reunification services would frequently require delays in permanency planning. Similar requests to acquire additional evidence in support of a parent's claim [that termination of parental rights would be detrimental to the child] could be asserted in nearly every dependency proceeding where the parent had maintained some contact with the child. The Legislature did not contemplate such last-minute efforts to put off permanent placement. . . . While it is not beyond the juvenile court's discretion to order a bonding study late in the process under compelling circumstances, the denial of a belated request for such a study is fully consistent with the scheme of dependency statutes, and with due process." (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1197, fn. omitted.) Because the request for a bonding study came late in the proceedings, and it did not appear that the study would have been useful to the court, there was no abuse of discretion in the denial of parents' motion.

II

Mother and father both claim the trial court abused its discretion by terminating their parental rights. They argue the section 366.26, subdivision (c)(1)(B)(i) "benefit" exception to termination of parental rights applies. We disagree and affirm the juvenile court's order terminating parental rights.

By the time of the May 28, 2009 section 366.26 hearing, Andrew's interest in a permanent placement had become paramount over the parents' interest in reunification. (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) Section 366.26 requires the juvenile court to select and implement one of four possible permanent plans for a dependent child. The

permanent plan preferred by the Legislature is adoption. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732.) If the child is likely to be adopted, the Welfare and Institutions Code directs the court to terminate parental rights and order the child placed for adoption. (§ 366.26, subd. (c)(1).) Here, the juvenile court found by clear and convincing evidence that Andrew was likely to be adopted. Mother and father do not contest this finding. Instead, they claim that the "benefit" exception as embodied in section 366.26, subdivision (c)(1)(B)(i) applies, and it was an abuse of discretion for the court to terminate their rights.

Section 366.26, subdivision (c)(1)(B) authorizes the juvenile court to avoid the termination of parental rights to an adoptable child if it finds a "compelling reason for determining that termination would be detrimental to the child [because] . . . [¶] . . . [t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing [that] relationship." The juvenile court in this case found that "[t]here is no compelling reason to find that it would be detrimental to Andrew to terminate parental rights. . . . The Court finds no exception to adoption applies in this case." We review a juvenile court's ruling on whether the so-called benefit exception applies to termination of parental rights pursuant to section 366.26 for substantial evidence. (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424-425.) "[W]e presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

Mother and father bore the burden of showing both that they maintained regular visitation and contact with Andrew, and that he would benefit from continuing a relationship with them. (*In re Zeth S.* (2003) 31 Cal.4th 396, 412, fn. 9.) Respondent disputes the regularity and consistency of the visitation, arguing that both mother and father missed visits and neither had unmonitored visitation. The record shows that in one six-month period, mother missed 18 visits and father missed 22. But, as conceded by

respondent, there also was evidence that the parents each visited at least weekly with Andrew for the duration of the proceedings. We shall assume for purposes of this decision that the visitation requirement of the benefit exception was met, and look to whether mother or father showed that Andrew would benefit from a continuing parent-child relationship.

"When contesting termination of parental rights under the [benefit exception], the parent has the burden of showing either that (1) continuation of the parent-child relationship will promote the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents [citation] or (2) termination of the parental relationship would be detrimental to the child . . . . [¶] To overcome the preference for adoption and avoid termination of the natural parent's rights, the parent must show that severing the natural parent-child relationship would deprive the child of a *substantial,* positive emotional attachment such that the child would be *greatly* harmed." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) "A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does not meet the child's need for a parent." (*Ibid.*) "To overcome the strong policy in favor of terminating parental rights and to fall within [the purview of the benefit exception], the parent must show more than 'frequent and loving contact' [citation], and be more to the child than a mere 'friendly visitor or friendly nonparent relative.' [Citation.]" (*In re Helen W.* (2007) 150 Cal.App.4th 71, 81.)

In determining the existence of a beneficial relationship, we look to "'[t]he age of the child, the portion of the child's life spent in the parent's custody, the "positive" or "negative" effect of interaction between parent and child, and the child's particular needs . . . .' [Citation.]" (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206.) We note that at 33 months, Andrew was too young to understand the concept of a biological parent. As the juvenile court stated in ordering parental rights terminated, Andrew had

spent more than half of his short life in the care of Evelyn C. By both mother and father's admission, he stayed with Evelyn C. 15 to 20 times prior to detention. The 15 months Andrew spent with his parents were chaotic and violent; both parents used drugs and engaged in frequent domestic violence. While Andrew's interactions with mother and father during visitation were positive, nothing in the record indicates that they were particularly like those of a child with a parent. Andrew greeted his parents warmly at the beginning of the visits, but did not cry or become upset when the visits ended.

There is no evidence that Andrew has any particular needs that can be met by either mother or father that cannot be met by Evelyn C. As the trial court noted, Evelyn C. has been Andrew's mother "for the last 18 months." The record indicates that she provided well for Andrew. He was in a stable, nurturing environment with a relative caregiver committed to adopting him. Mother and father did not reunify with Andrew during the 16 months that reunification services were provided. They maintained their contentious relationship, and mother repeatedly tested positive for drugs (methamphetamines). Andrew's interest in stability and permanent placement was not outweighed by any potential detriment from terminating mother and father's parental rights. Parents argue that legal guardianship with Evelyn C. would have been a better outcome, but there is substantial evidence in the record supporting the juvenile court's order, and we find no abuse of discretion.

DISPOSITION

The order is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.